

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

76-7403

76-7403

ALL TAMER LAWLESS

In The

United States Court of Appeals

For The Second Circuit

CONTEMPORARY MISSION, INC.

Plaintiff-Appellee

vs.

FAMOUS MUSIC CORPORATION

Defendant-Appellant

PARAMOUNT PICTURES CORPORATION and ALLIED
WESTERN CORPORATION

Defendants

*On Appeal from the District Court of the
Southern District of New York*

REPLY BRIEF FOR DEFENDANT-APPELLANT

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In The
United States Court of Appeals

For The Second Circuit

Dockets Nos. 76-7403, 76-7440

CONTEMPORARY MISSION, INC.,

Plaintiff-Appellee,

-against-

FAMOUS MUSIC CORPORATION,

Defendant-Appellant,

PARAMOUNT PICTURES CORPORATION and GULF +
WESTERN CORPORATION,

Defendants.

*On Appeal from the United States District Court for the
Southern District of New York.*

**REPLY BRIEF OF DEFENDANT-APPELLANT AND
CROSS APPELLEE FAMOUS MUSIC CORPORATION**

This memorandum is submitted in reply to the brief of Contemporary Mission, Inc. ("Contemporary") on the appeal of Famous Music Corporation ("Famous") and in opposition to the cross-appeal by Contemporary.

I.

PLAINTIFF WAIVED THE \$50,000 PROMOTIONAL REQUIREMENT.

Plaintiff contends that the waiver of the \$50,000 requirement via the November 28, 1972 letter agreement (A289) required an affirmative act (exercise of an option) in order to actually rescind the \$50,000 promotional requirement contained in the Virgin agreement. But there is not even a hint of such a requirement in the letter. Rather its language is indicative of an entirely different meaning. It states:

"Famous shall be relieved of its obligation to spend a minimum of 50,000 dollars in the promotion of Virgin record sales, if, as, and when in the sole opinion of Famous Music Corporation, promotion shall cease to be effective and profitable."

Thus, Famous needed to do nothing, having been relieved of any legal obligation to spend \$50,000. Upon execution of the letter it was vested with absolute discretion concerning how much, if any, of the \$50,000 to spend, and its opinion could not be challenged.

II.

THE CRUNCH CONTRACT WAS ASSIGNABLE.

The plaintiff at page 24 of its brief renews its argument that the Crunch agreement was not assignable. While this contention has been previously dealt with in the brief of defendant-appellant Famous, the critical importance of determining the assignability of the Crunch agreement deserves repetition. Either the Crunch contract was assignable and ABC Records, Inc. ("ABC") obtained the rights and obligations flowing from said agreement, or it was not and ABC had no such rights and

obligations. To put it another way, if the Crunch contract was assignable, then ABC was entitled to notice of breach in accordance with Paragraph 15 and ABC would be obligated to promote the records released under the Crunch label. The plaintiff has tried to take both sides of this issue and thus has itself created a great deal of confusion. That confusion is best illustrated by the testimony of John O'Reilly and colloquy of counsel wherein the alleged conversation with ABC's Korobkin was described (A6-20; T231-245, A38-45; T348-363). The assertions of plaintiff as to the assignability of Crunch and its theory of liability thereunder changes almost from page to page. Even now plaintiff at page 41 of its brief states that:

"[I]t has never alleged that ABC has breached any contractual obligation *to it*; rather [it] has consistently claimed that no one [including ABC] ever promoted the . . . Crunch recording after the July 31, 1974 sale"

The plaintiff has never explained how, if ABC had no contractual obligations to it, the jury could award plaintiff some \$104,000 premised upon a finding that ABC refused "to perform the Crunch contract". Hopefully, the plaintiff will be forced to adopt one consistent position on liability. Such consistency would require as a first step a determination as to whether or not the Crunch contract was assignable. Famous argues that contract was clearly assignable on its face.

III.

THERE IS NO ADMISSIBLE PROOF IN THE RECORD THAT ABC BREACHED THE CRUNCH AGREEMENT.**A. Testimony Other Than Hearsay**

Contemporary indicates at page 29 of its brief that aside from the hearsay testimony relating to alleged statements by one of ABC's in-house counsel, Len Korobkin, there is other proof in the record that shows ABC breached Crunch viz., the testimony of Ruppert and Martell. A look at the proof reveals a good deal about the quality of Contemporary's entire case. First, the testimony of Fred Ruppert relied upon by plaintiff is set forth below:

"Q. To your knowledge did ABC promote Fear No Evil? A. No."

What plaintiff fails to mention to the court is that "Fear No Evil" was released under the Virgin agreement and has nothing whatsoever to do with Crunch. As to the testimony of Martell referred to on page 30 of Contemporary's brief, it is meaningless, particularly since Martell had no idea of what Famous merchandise was being sold by ABC and in no way refers to a failure to promote any Crunch records.

B. The Hearsay Testimony

Before discussing the hearsay testimony on which plaintiff must rely, the chronology of events surrounding Contemporary's dealing with ABC should be repeated. Shortly after the sale of Famous to ABC on July 31, 1974, Contemporary contacted Famous and then ABC. A week or so later, O'Reilly met with Korobkin, and shortly thereafter (August 19 and 21, 1974) the telegrams and letters claiming Crunch was non-assignable were

sent by Contemporary. In November of 1974 this lawsuit began. The claim that ABC breached the Crunch agreement was never pleaded in this lawsuit and no suit has ever been instituted by Contemporary against ABC.

Plaintiff first suggests that no objection was raised as to the Korobkin testimony. Aside from the oral objections (A7; T232; A38, 39; T348, 349), Famous presented the court with an informal memorandum, a copy of which was handed to all counsel and which sets for the specific objection under FRE 804. A copy of that memorandum is set forth in full in an addendum to this brief.

The suggestion that Rule 803(3) was the appropriate exception to the hearsay problem was never raised by plaintiff at trial; nor does it have merit now. Quite simply the state of mind or intent of Korobkin, a staff attorney at ABC, has never been at issue in this trial. Furthermore, Korobkin was without authority to bind ABC. The cases cited by plaintiff all concern situations where the state of mind or intent of the declarant was relevant. For example, *United States v. Annunziato*, 293 F.2d 373 (2nd Cir. 1961) involved a criminal conspiracy charge and hence the intent or specific plan of the conspirators was an element of the government's case. Hearsay testimony as to what a co-conspirator planned to do was therefore admissible. Such an evidentiary ruling is not uncommon in conspiracy trials. But the courts usually do not allow such statements to show that the act was in fact done. *United States v. Diez*, 515 F.2d 892 (5th Cir. 1975); *United States v. Kaplan*, 510 F.2d 606 (2nd Cir. 1974); *United States v. Palmiotti*, 254 F.2d 491 (2nd Cir. 1958). In *Scholle v. Cuban-Venezuelan Oil Voting Trust*, 285 F.2d 318 (2nd Cir. 1960) plaintiff needed to demonstrate that he had reason to believe he could obtain a certain loan (not that he would in fact obtain the loan) and in *Oneonta Dress Co. v. NLRB*, 333 F.2d 1 (2nd Cir. 1964) testimony as to the state of mind of the president of defendant corporation (why he felt it necessary to shut down a particular plant) was a crucial part of

an affirmative defense. In both cases, the state of mind or intent of a party was an essential portion of a party's case. In this action the state of mind of Korobkin is not an element in the case of either plaintiff or defendant, and it has no bearing on what ABC might have done.

STATEMENT OF ISSUES PRESENTED ON CROSS APPEAL

This portion of the brief deals with the cross-appeal by Contemporary. The issue presented is:

Whether the ruling by the trial court that plaintiff's Exhibit 56 was inadmissible to prove how high on the *Billboard* "Hot Soul Singles" Chart their record "Fear No Evil" would have gone was reversible error.

STATEMENT OF CASE

A. Nature of Case

The court's attention is directed to the brief submitted by Famous on its appeal for a full statement of the nature of the case.

B. Opinions Below

This cross-appeal deals only with one evidentiary ruling made by the trial court. Judge Owen ruled that the plaintiff's statistical analysis of all records that reached No. 61 on a chart in an industry magazine (A238) was inadmissible to prove that plaintiff's single record, "Fear No Evil", would have reached either No. 20 or No. 30 on said chart as did 50% or 65%, respectively, of all such records that attained position No. 61. His ruling was premised upon the fact that the plaintiff's chart did not take into account such factors as the speed with which a

record rose upward, the statement by counsel O'Neil during a pretrial deposition that testimony as to how high a record might go would be "pure speculation", and *Freund v. Washington Square Press, Inc.*, 34 N.Y.2d 379, 357 N.Y.S.2d 857 (1974) (A31-34; T275-278). The court, at plaintiff's request, reconsidered this ruling (A44; T363) and again ruled that the exhibit was inadmissible (A70, 71; T389, 390).

C. Statement of Facts

These facts supplement the statement of facts previously set forth in Famous' brief in support of its appeal.

The plaintiff sought to introduce into evidence a document (A238) (for ease of referral, hereinafter Exhibit 56), which tracked the movement on the "Hot Soul Singles Chart" of *Billboard* (the "*Billboard* Chart") of every record that reached No. 61 on the *Billboard* Chart during the calendar year 1974. The *Billboard* Chart is prepared by *Billboard* magazine on a weekly basis and reflects both the sales movement and radio air play received by a record during the previous week. It should be noted that only two records produced by Contemporary ever appeared on any of the various charts in *Billboard*, and only one of these, "Fear No Evil", is relevant to this appeal. The plaintiff attempted to show how high "Fear No Evil" might have gone on the *Billboard* Chart via Exhibit 56. This proof was to be the initial building block of its proof as to the amount of sales, concert tours, theatrical tours and other benefits that would have resulted from a position of thirty or better on the *Billboard* Chart.

Exhibit 56 revealed that 50% of all songs that reached No. 61 on the *Billboard* Chart ultimately achieved No. 20 and that 65% reached No. 30.¹ Exhibit 56 included every record that reached No. 61 without regard to the prior success and

1. In an earlier submission to the court, the statistical chances of success set forth by plaintiff had been even lower (A46; T365).

reputation of the artist, or the "many, many factors" (A78; T397) that even plaintiff conceded were involved in a song reaching position No. 30 or No. 20.

I.

THE TRIAL COURT PROPERLY EXCLUDED PLAINTIFF'S EXHIBIT 56 BECAUSE SUCH PROOF WAS SPECULATIVE.

A. Introduction

The court determined for the reasons set forth above that Exhibit 56 did not offer a proper basis for the jury to determine how "Fear No Evil" would have gone on the *Billboard* Chart and, specifically, that its introduction would have allowed the jury to speculate. As will be seen below, not only does the relevant case law pose great difficulties for plaintiff, but its prior admission and own method of proof via Exhibit 56 was patently inadequate.

B. Plaintiff's Admission

No better statement of both the legal and factual difficulties involved in admitting Exhibit 56 can be found than the words of plaintiff's own attorney at a deposition taken in this case and referred to by the court in its ruling:

"[Judge Owen] . . . your client was asked, 'Do you have in mind how far this song would have gone?' And your interjection was, 'That is pure speculation as to how far it would have gone obviously. It could have gone to number one. It could have gone to number 30, it could have gone to number 50 or whatever. He has no way of knowing that. That is pure speculation.'" (A33; T277).

Such a statement of counsel has been held to be an admission of the party under Federal Rules of Evidence 801(d)(2)(c). See *Glick v. White Motor Company*, 458 F.2d 1287 (3rd Cir. 1972) (admission of counsel during trial as to authentication of certain exhibits). Other such statements by counsel have been similarly construed. See *Rhoades, Inc. v. United Air Lines, Inc.*, 340 F.2d 481 (3rd Cir. 1965) (statement in opening address); *State Farm Mutual Auto Ins. Co. v. Porter*, 186 F.2d 834 (9th Cir. 1950) (answer even though later superseded); *Fowler v. United States*, 239 F.2d 93 (10th Cir. 1956) (pleadings on motion to suppress evidence in criminal trial); *United States v. Dolleris*, 408 F.2d 918 (6th Cir.), *cert. denied*, 395 U.S. 943 (1969) (statement by counsel at IRS conference; client not present); *United States v. O'Connor*, 433 F.2d 752 (1st Cir. 1970), *cert. denied*, 401 U.S. 911 (1971) (statement by counsel at IRS conference; client not present). Thus, the plaintiff through its attorney has conceded that proof such as Exhibit 56 is speculative and hence not admissible.

C. The Case Law

In New York, the law is and has been well-settled that speculation and conjecture with regard to damages is improper. Damages if estimated must be established by a stable and reliable foundation. *Wakeman v. Wheeler & Wilson Manufacturing*, 101 N.Y. 205, 4 N.E. 264 (1886); *Hewlett v. Caplin*, 275 App. Div. 797, 88 N.Y.S.2d 428 (1st Dept. 1949), *aff'd*, 301 N.Y. 591, 93 N.E.2d 493 (1950); *Broadway Photoplay Co. v. World Film Corp.*, 225 N.Y. 104, 121 N.E. 756 (1919); *Freund v. Washington Square Press, Inc.*, *supra*. Even plaintiff has always conceded this.

Furthermore, the plaintiff has had the burden of proving the amount of its damages by competent evidence. Thus, it was incumbent upon Contemporary to present to the trial court a proper method and basis for the ascertainment of the amount of lost profits which it seeks to recover. *Dunkel v. McDonald*, 272

App. Div. 267, 70 N.Y.S.2d 653 (1st Dept. 1947), *aff'd*, 298 N.Y. 586, 81 N.E.2d 323 (1948); *Alexander's Dept. Stores v. Ohrbach's, Inc.*, 269 App. Div. 321, 56 N.Y.S.2d 173 (1st Dept. 1945); *Joy Vending Co. v. S. & A. Luncheonette & Restaurant, Inc.*, 15 Misc.2d 565, 180 N.Y.S.2d 194 (Mun. Ct. City of N.Y. 1958). This burden is not met until plaintiff furnishes all the elements from which an inference can be reasonably drawn as to the amount of the damages, *Lichterman v. Barrett*, 157 N.Y.S. 882 (App. Term 1st Dept. 1916).

The law of New York clearly requires a District Court to be satisfied that plaintiff has properly established his foundation, as set forth above, before expert testimony in its behalf may be proffered as to what plaintiff's records might have achieved in the marketplace. In *Hewlett v. Caplin*, *supra*, the trial court awarded plaintiff a verdict of \$9,000 consisting of plaintiff's share of royalties from the prospective sales of a book which was the subject of the alleged contract between the parties. On appeal, the Appellate Division agreed that there had been a breach of contract, but, in reversing the jury award, concluded that the record was barren of any proof of damage:

"The verdict for plaintiff in the sum of \$9,000 as damages is wholly speculative and without any basis in the evidence. Plaintiff claimed one half of 10% of an unknown retail selling price on an unknown number of copies of a non-existent book, and a percentage of unknown proceeds from the non-existent sale of book rights of a book never written or never published. Whether the book would have met with public favor was entirely conjectural. Without a factual basis for computing the amount of the prospective royalties plaintiff could not recover compensatory damages." *Id.* at 797-798; 88 N.Y.S.2d at 428-429.

The recent case of *Freund v. Washington Square Press, Inc.*, *supra*, was an action brought by an author against a publisher for breach of contract to publish the author's book. The plaintiff had delivered a completed manuscript to the publisher but the latter wrongfully failed to publish it. The plaintiff, who had previously received a \$2,000 advance from the publisher, sought both the royalties which he would have received had the book been published as well as the cost of publication had he published it himself. The Court of Appeals, in reversing a \$10,000 award of damages to plaintiff, held that such a recovery would have placed the plaintiff in a better position than if the defendant performed the contract. Speaking for a unanimous court, Judge Rabin stated:

"His expectancy interest in the royalties - the profit he stood to gain from sale of the published book - while theoretically compensable, was speculative. Although his work is not plaintiff's first, at trial he provided no stable foundation for a reasonable estimate of royalties he would have earned had defendant not breached its promise to publish. In these circumstances, his claim for royalties falls for uncertainty. (Cites omitted.)

Since the damages which would have compensated plaintiff for anticipated royalties were not proved with the required certainty, we agree with the dissent in the Appellate Division that nominal damages alone are recoverable. (Cites omitted.) Though these are damages in name only and not at all compensatory, they are nevertheless awarded as a formal vindication of plaintiff's legal right to compensation which has not been given a sufficiently certain monetary valuation. (Cited omitted.)" *Id.* at 383-384; 357 N.Y.S.2d at 861.

Unlike Contemporary, the plaintiff in *Freund* was not a newcomer to this field. In the case at bar, plaintiff had no successful track record; the few records produced previously by plaintiff have been quite unsuccessful. "Fear No Evil" had spent ten weeks on the *Billboard* Chart, and yet could only manage to reach position No. 61. The inescapable conclusion is that the recording industry is a field in which it is difficult to gain a foothold despite plaintiff's own vigorous efforts.

In light of these foregoing factors, plaintiff's mathematical "estimates" as to how high "Fear No Evil" might have risen on the *Billboard* Chart must be viewed as nothing more than conjecture and speculation.

Damages which are so uncertain, contingent and imaginary as to be incapable of adequate proof cannot be recovered, and the plaintiff may not "roll the dice" in an effort to recover damages. *K & R Film Co. Inc. v. Brady*, 104 Misc. 667, 172 N.Y.S. 268 (App. Term 1st Dept. 1918); *Harris Structural Steel Co. v. Chapman*, 162 Misc. 709, 295 N.Y.S. 443 (Mun. Ct. City of N.Y. 1937); *Halpern v. Budner*, 149 N.Y.S.2d 716 (Sup. Ct. Nassau Co. 1956); *modified on other grounds*, 5 A.D. 2d 1011, 174 N.Y.S.2d 254 (2nd Dept. 1958); *Schreiber v. Kleban*, 63 Misc. 2d 628, 312 N.Y.S.2d 1007 (Civil Ct. City N.Y., N.Y. Co. 1970). Moreover, although damages need not be measured with mathematical certainty, no damages can be awarded unless plaintiff provides a reasonable basis and method of computation. As stated by Judge Cardozo in *Broadway Photoplay Co. v. World Film Corp.*, *supra*:

"The plaintiff's theory is that a jury, analyzing its receipts, would discover uniformities and averages from which the profits of first-run pictures might be approximately measured. Little depends, it is said, upon the ultimate popularity of the pictures as disclosed by later runs. The bait of novelty suffices at the outset

It is true, of course, that the conditions of a business affect the possibilities of proof and thus the measure of recovery [The plaintiff] did succeed in showing that 'feature' pictures were more profitable than others The difference, however, was not constant or even approximately constant. It was subject to the widest fluctuation. Quality counts, it seems with pictures as with plays." *Id.* at 107, 108.

See, also, *Readex Microprint Corp. v. General Aniline & Film Corp.*, 74 N.Y.S.2d 613 (Sup. Ct. N.Y. Co. 1947).

As can be seen from the above discussion, plaintiff not only faced an almost insurmountable legal obstacle in proving how high "Fear No Evil" would have gone on the *Billboard* Chart but the method plaintiff chose fell far short of overcoming that legal obstacle.

D. Plaintiff's Statistical Projection

As indicated, plaintiff offered into evidence via Exhibit 56 an analysis of every song that had been at the No. 61 position on the *Billboard* Chart in the calendar year 1974.

From these projections the jury would have been asked to determine whether or not "Fear No Evil" would have reached No. 30 or better on the *Billboard* Chart. Aside from the obvious difficulty of determining possible success in the very unpredictable record industry by such a method, cross-examination of John O'Reilly, who prepared the charts, revealed other inherent difficulties with Exhibit 56.

The plaintiff had made no attempt to see how long it took songs that reached the top 20 or 30 to show such a position. For example, a song that made No. 30 or better might have only taken an average of five weeks to do so, as opposed to "Fear No Evil" taking ten weeks to reach No. 61. (See A284 where such a study was made.)

Judge Owen himself tried to obtain this information only to be met by a not uncharacteristic outburst by the witness (A55-58, A61-65; T374-377, T380-384). Plaintiff did not attempt to see how the number of "bullets" a song received (an indication of rapid upward movement) related to success on the chart; not surprisingly "Fear No Evil" had no such "bullets" (A71, 72-75; T390, 391-394). Nor did the plaintiff's analysis take into account whether the artist was a newcomer or an established artist (A76, 78; T395, 397).

Finally, the court asked John O'Reilly:

"THE COURT: Just give me a yes or no on this, is a factor in reaching 30 that the artist has had previous success of some substance?

THE WITNESS: Is it a factor? *It is one of many, many factors, yes*" (emphasis supplied) (A78; T397).

At that point the court again ruled that the plaintiff's chart was inadmissible (A80; T399). Indeed, it seems obvious that a mere statistical analysis does not take into account any of the endless variables that determine whether or not a record will reach a particular position on the "Hot Soul Singles Chart".² The court had no choice but to exclude the proffered evidence and that ruling should be sustained on this appeal.

2. The most qualified witness to testify at trial concerning the record industry was Stanley Gortikov (A122-128; T1837-1843), and all he could say was that success in the record industry was impossible to predict (A131; T1886).

CONCLUSION

For all of the reasons set forth herein and in the original brief of Famous, it is respectfully requested that the jury verdict and judgment entered pursuant thereto should be reversed and judgment entered granting plaintiff the sum of \$16,500 and the plaintiff's cross-appeal should be dismissed.

Respectfully submitted,

**HAWKINS, DELAFIELD &
WOOD**

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ADDENDUM

**MEMORANDUM IN OPPOSITION TO ADMISSION OF
CERTAIN HEARSAY STATEMENTS**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

CONTEMPORARY MISSION, INC.,

Plaintiff,

-against-

**FAMOUS MUSIC CORPORATION, PARAMOUNT
PICTURES CORPORATION, and GULF + WESTERN
CORPORATION,**

Defendants.

74 Civ. 4945 (R.O.)

Preliminary Statement

This memorandum is submitted in opposition to the admission of statements allegedly made by an officer of ABC Records, Inc. via the testimony of John O'Reilly.

**EVIDENCE OF HEARSAY STATEMENTS MADE BY LEN
KOROBKIN OF AMERICAN BROADCASTING CO. ARE
IRRELEVANT AND INADMISSIBLE UNDER THE
FEDERAL RULES OF EVIDENCE**

Plaintiff has attempted to introduce in evidence certain hearsay statements made by Len Korobkin, a former officer of ABC Records, Inc. ("ABC"). Plaintiff will fit these statements into the "statements against interest" exception to the hearsay

rule. (This point will be dealt with in full, below.) Regardless of the merits of plaintiff's claimed exception, the statements are irrelevant and therefore inadmissible.

If, for some reason, the statements are deemed relevant, they are still inadmissible by reason of plaintiff's failure to comply with the express requirements of the Federal Rules of Evidence regarding the statement against interest exception to the hearsay rule.

Rule 804 is the specific provision applicable; it requires, as a condition precedent to admissibility, that the declarant be "unavailable as a witness". [Rule 804(b)].

The key concept is availability of the witness. The rule reads, in relevant part:

"(a) Definition of unavailability --
'Unavailability as a witness' includes situations in
which the declarant * * * *

(5) is absent from the hearing and the proponent if his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b) (2), (3) or (4), his attendance or testimony) by process of other reasonable means." [Rule 804(a)(5)]

In the case at bar, plaintiff has not served Mr. Korobkin with a subpoena. Mr. Korobkin has a law office in Los Angeles where he is, to be sure, beyond the subpoena power of this Court. However, despite the fact that Mr. Korobkin also maintains an office in New York City, plaintiff has failed to even attempt to serve him with a subpoena here.

The additional requirement of Rule 804(a)(5) regarding depositions is explained by Weinstein:

"... Congress amended the rule to require an attempt to take the deposition if Rule 804(a)(5) was the foundation for exceptions 804(b)(2), (3), or (4)." (4 *Weinstein's Evidence* 804-42)

In other words, where, as here, plaintiff is attempting to utilize the statement against interest exception, plaintiff must, as a foundation, show that the witness is unavailable. This unavailability is established only upon a showing that the witness cannot be served with process *and* that the deposition of the witness cannot be taken.

Plaintiff herein has never attempted to depose Mr. Korobkin, even though the Federal Rules regarding depositions place no geographical limit on where a deposition may be taken. See Rule 26, Federal Rules of Civil Procedure.

In sum, plaintiff has failed to take the reasonable steps required by Rule 804 to procure the testimony of Mr. Korobkin either through subpoena or deposition. Plaintiff, then, has failed to demonstrate that Mr. Korobkin is truly "unavailable as a witness". Without the proper foundation, plaintiff cannot make use of the statement against interest exception to the hearsay rule.

Respectfully submitted,

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A 201 Affidavit of Service by Mail

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

LUTZ APPELLATE PRINTERS, INC.

Index No.

CONTEMPORARY MISSION, INC.,

Defendant-Appellant,

- against -

FAMOUS MUSIC CORP., et al.,

Plaintiff-Appellee

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Velma N. Howe, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 298 Macon Street, Brooklyn, New York 11216. That on the 19th day of November 1976, deponent served the annexed

Reply brief upon William D. O'Reilly attorney(s) for
in this action, at 52 Sharon Road Windham, New Hampshire 02383

the address designated by said attorney(s) for that purpose by depositing 2 true copies of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.

Sworn to before me, this 19th
day of November 19 76

Beth A. Hirsh
BETH A. HIRSH
NOTARY PUBLIC, State of New York
No. 41-4000100
Qualified in Queens County
Commission Expires March 30, 1978

Velma N. Howe
Print name beneath signature
Velma N. Howe